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No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC. and PHILIP MORRIS USA INC.,

Petitioners,

v.

STEPHANIE GOOD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving preemption issues, to point out the economic inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Bates v. Dow AgroSciences LLC,* 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000); *United States v. Locke,* 529 U.S. 89 (2000).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of federal regulatory programs. Such programs include the Federal Cigarette Labeling and Advertising Act (the

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief; WLF has lodged letters of consent with the clerk.

"Labeling Act"), which is intended to promote uniformity in cigarette labeling/advertising regulation and to reinforce First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict commercial speech.

WLF agrees with Petitioners that the state-law causes of action raised by Respondents Stephanie Good, *et al.* (collectively, "Good") are both expressly and impliedly preempted by federal law. WLF files separately in order to address whether the Court, in attempting to discern congressional intent, ought to begin with a presumption that Congress did not intend to preempt Good's causes of action. Good argued in support of such a presumption in the courts below and can be expected to renew that argument before the Court.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in the important preemption issues raised by this case.

STATEMENT OF THE CASE

Petitioners are residents of Maine and long-time smokers of Marlboro Lights cigarettes. They allege that Petitioner Philip Morris USA, Inc. (the manufacturer of Marlboro Lights) advertised and promoted its products in a manner that deliberately deceived them regarding the health consequences of smoking light cigarettes. Alleging that Petitioners' conduct amounted to unfair or deceptive acts or practices, in violation of the Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. Ann. tit. 5, § 207 (2002), Good seeks a return of sums

paid to purchase Petitioners' cigarettes, as well as punitive damages and attorney fees.

On May 26, 2006, the district court granted Philip Morris's motion for summary judgment on the grounds that Good's claims were expressly preempted by the Labeling Act. Pet. App. 63a-106a. In light of that holding, the court declined to reach other grounds for dismissal asserted by Philip Morris, including implied preemption. *Id.* 64a n.1.

On appeal, Good asserted *inter alia* that the district court had erred in failing to give sufficient weight to a presumption against federal preemption of state law. *See, e.g.*, Respondents' First Circuit Brief, 2006 WL 4015606 at *18 (2007) ("This presumption against preemption applies in the instant case, because preemption here would displace the historic power of the states to protect the health and safety of their citizens.").

The First Circuit vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-62a. The appeals court concluded, without commenting on the presumption against preemption, that Good's claims were: (1) not expressly preempted by the Labeling Act; (2) not implicitly preempted, either by the Labeling Act or by the Federal Trade Commission's (FTC) oversight of tar and nicotine claims in cigarette advertising; and (3) not barred by a MUTPA exemption for "transactions or actions otherwise permitted." *Id.* 61a. The Court granted review to consider the first and second rulings.

SUMMARY OF ARGUMENT

In deciding whether Congress has intended to preempt state or local law, the Court for the past 60 years has *on occasion* invoked an "assumption" or a "presumption" against preemption. When doing so, the Court has explained that when Congress has legislated "in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the [federal legislation] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The use of that assumption/presumption has been subject to substantial criticism in the legal community because it lacks any grounding in constitutional history, because it has led to widespread confusion in the lower courts and to inconsistent judicial decisions, because there is no empirical evidence to support the Court's principal justification for the assumption/presumption (*i.e.*, a supposed congressional reluctance to displace state and local law), and because the Court itself has cited the assumption/presumption only sporadically in its preemption decisions. *See generally,* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 101 (2008).

WLF respectfully suggests that the presumption ought to be laid to rest. A principal purpose of a well-considered rule of statutory construction is that it supplies helpful guidance to courts when attempting to discern legislative intent. Among its many shortcomings, the presumption against preemption badly flunks this "helpful guidance" test. There is simply no meaningful way to gauge how much weight to

accord to the presumption in the face of contrary evidence of a preemptive intent. The presumption has led many lower courts to attach overriding significance to the presumption in the face of substantial evidence of preemptive intent, while other lower courts have applied the presumption only as a tie-breaker. This case is an appropriate vehicle for the Court to weigh in on the continued viability of the presumption against preemption, because the interpretation of the Labeling Act's express preemption provision adopted by a plurality of this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), was informed to a significant degree by the plurality's invocation of the presumption against preemption. In deciding whether to confirm the *Cipollone* plurality's interpretation of the Labeling Act's preemptive sweep, the Court ought to consider whether the plurality invoked the presumption in an appropriate manner.[2]

Alternatively, the Court ought to make clear that, whatever the continued viability of the presumption against preemption, it is wholly inapplicable to cases of this sort. The case for a presumption is strongest in disputes involving field preemption claims, the category of claims in which the presumption first developed. In such cases, the presumption can serve as a useful reminder that there is little reason to draw an inference of an intent to preempt state regulation based solely on the extensive nature of federal regulation in a particular field. That rationale has no application in conflict

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[2] WLF agrees with Petitioners that even in the absence of any such reconsideration, Good's causes of action are preempted under the interpretation of the Labeling Act set out in *Cipollone* and *Lorillard v. Reilly*, 533 U.S. 525 (2001).

preemption cases; there is indeed good reason to assume that Congress would seek to preempt state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Nor is the rationale of much relevance in express preemption cases; when Congress has included an express preemption provision in a statute, the actual language, purpose, and context of the statute are much better guides to Congress's intended meaning than any presumptions about that intent.

The presumption against preemption is inapplicable here for the additional reason that cigarette advertising and labeling have long been subject to extensive federal regulation. Given that history, there is no reason to assume that Congress would be reluctant to displace state regulation of the identical subject matter, particularly when there is substantial reason to fear that state regulation would frustrate Congress's goal of a regulatory framework that applies uniformly nationwide. Moreover, there is far less reason to presume a congressional reluctance to displace state common law (which is established on a case-by-case basis by factfinders not required, when deciding whether to impose liability in a particular case, to weigh the costs and benefits of its actions to society as a whole) than to displace state law established by state officials acting through state administrative or legislative lawmaking processes.

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION HAS PROVEN TO BE UNWORKABLE AND OUGHT TO BE ELIMINATED

The presumption against preemption is a rule of statutory interpretation of relatively recent origin. Designed to assist courts in discerning congressional intent, it lacks any constitutional underpinnings and played no role in the many preemption cases heard by the Court for its first 150 years. Moreover, the presumption has led to widespread confusion among the lower courts, and there is no empirical evidence to support the Court's rationale for employing the presumption as an indicator of congressional intent. Indeed, the Court has cited the presumption only sporadically in its recent preemption decisions. WLF respectfully suggests that the presumption ought to be eliminated.

A. Preemption of State Tort Law Is Ultimately an Issue of Congressional Intent

Whether the federal government has preempted an assertion of regulatory authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As the Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent . . ." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). *Cipollone*, 505 U.S. at 516 ("'the purpose of Congress is the ultimate

touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) ("any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of *congressional purpose*'") (emphasis in original) (quoting *Cipollone*, 505 U.S. at 530 n.27 (plurality opinion).

In other words, it is the role of Congress, not a court, to define how broad or narrow should be the preemptive reach of a federal statute or regulatory framework. Of course, the courts look to a variety of sources and employ a variety of interpretive techniques in attempting to discern what Congress intended.[3] But once Congress's preemptive intent has been identified, it is not the role of the courts to construe the scope of preemption broadly or narrowly based on some unrelated factors. A court's "task in all pre-emption cases is to enforce the 'clear and manifest purpose of Congress.'" *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rice*, 331 U.S. at 230).

In cases raising *express* preemption issues, the courts look primarily to a federal statute's express preemption provision, as well as the entire statutory framework in discerning congressional intent. *See, e.g., Bates,* 544 U.S. at 449 (Court looks initially to statutory

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[3] "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S. at 486 (quoting *Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

language in determining express preemption claims; only if statutorily-based arguments opposing preemption are "just as plausible" as those supporting preemption does Court ever turn to presumptions disfavoring preemption). In cases raising *implied conflict* preemption issues, the courts look to statutory language (and steps taken by federal agencies to implement their statutory authority) to determine the full purposes and objectives of Congress -- and then determine whether the challenged state law stands as an obstacle to the accomplishment and execution of those purposes and objectives. *See, e.g., Geier*, 529 U.S. at 871-72.[4]

B. The Presumption Against Preemption Is of Relatively Recent Origin and Lacks Any Constitutional Underpinnings

That Congress possesses unbridled authority to preempt state laws of which it disapproves – provided only that it is acting pursuant to its Article I powers – is made plain by the Supremacy Clause, which provides in relevant part:

This Constitution, and the Laws of the United

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[4] While *Geier* did not absolutely rule out the possibility that Congress in a specific instance might not intend to preempt a state law that stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives, it held that Congress should generally be deemed to have intended to preempt such state laws in the absence of specific evidence to the contrary – even when (as in *Geier* but unlike in this case) the relevant federal statute includes a "savings" clause that explicitly preserves common law liability claims. *Id.*

> States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

Nothing in the language of the Supremacy Clause suggests any federalism-based limitations on the power of Congress (when operating within its Article I sphere) to displace state-law regulation, even when the displaced law concerns a field which the States have traditionally occupied. The Court decided numerous preemption cases throughout its first 150 years – often involving fields that had previously been occupied only by the States – without once suggesting that federal statutes should be presumed not to preempt state law in the absence of a clear statement to that effect. *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Virginia law preempted by conflicting provisions of 1783 peace treaty between the United States and Great Britain; no suggestion that terms of treaty should be narrowly construed to avoid preemption); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 343-344 (1816) (efforts by Virginia courts to resist enforcement of U.S. Supreme Court orders – regarding title to Virginia real estate – preempted under Supremacy Clause). In an 1824 decision striking down a New York law adopted in the exercise of its police powers on the grounds that the New York law conflicted with congressional legislation, the Court said, "It will be immaterial whether those laws were passed . . . in virtue of a power to regulate [the several States'] domestic trade and police. . . . [T]he acts of [New York] must yield to the law of

Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210 (1824). By virtue of the Supremacy Clause, state law is preempted under such circumstances, regardless that it was "enacted in the execution of acknowledged state power." *Id.* at 211.

Indeed, the final phrase in the Supremacy Clause ("any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") strongly suggests that the Framers sought affirmatively to avoid any presumption against preemption. Such clauses, often referred to as "*non obstante* clauses,"[5] were regularly inserted into 18th Century legal documents. Under a legal doctrine familiar to 18th century practitioners – the presumption against implied repeals – courts might have been reluctant to declare a state law preempted even when it was in direct conflict with a statute adopted by Congress. "Applying the normal presumption against implied repeals, they might strain the federal law's meaning in order to harmonize it with state law" and thereby avoid a finding that the state law was preempted. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 255 (2000). The *non obstante* clause was added to the end of the Supremacy Clause to make clear that the presumption against implied repeals should not protect state laws from being struck down on federal preemption grounds. As Prof. Nelson explained:

[T]he final part of the Supremacy Clause is a

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[5] "*Non obstante*" is a Latin phrase meaning "notwithstanding." Black's Law Dictionary (4th ed. 1968) defines the phrase as encompassing "Words anciently used in public and private instruments, intended to preclude in advance, any interpretation contrary to certain declared objects or purposes."

> global *non obstante* provision. This provision established a rule of construction telling courts not to apply the traditional presumption against implied repeals in determining whether federal law contradicts state law. Thus, even if a federal statute or treaty did not itself contain a *non obstante* provision, the Supremacy Clause told courts not to strain its meaning in order to harmonize it with state law. As Daniel Webster asserted in his argument in *Gibbons v. Ogden*, "the presence or absence of a *non obstante* clause[] cannot affect the extent or operation of the act of Congress," because "the laws of Congress need no *non obstante* clause."

Id.

The proceedings of the Constitutional Convention provide further support for a conclusion that the Framers sought affirmatively to avoid any presumption against preemption. Early in the Convention, Governor Edmund Randolph proposed fifteen resolutions, primarily drafted by James Madison, which became known as the Virginia Plan. The sixth resolution dealt generally with the affirmative powers of Congress – the functional equivalent under the Virginia Plan of the Constitution's Art. I, § 8. 1 *The Records of the Federal Convention of 1787*, at 21 (M. Farrand ed., rev. ed. 1937). Among the powers allocated to Congress under this resolution was the authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." *See id.* In other words, under this proposal, Congress would be required to declare whether conflicting state law would be preempted.

In response to the Virginia Plan, William Patterson proposed nine alternative resolutions which became known as the New Jersey Plan or the Small State Plan. The sixth of Patterson's resolutions was in substance and concept, if not in form, similar to the current language of the Supremacy Clause. *See id.* at 245. Patterson's sixth resolution differed from Randolph's power to negative state laws in that the former was not proposed as one of Congress's affirmative powers. All such powers under the Small State Plan were proposed in Patterson's second resolution. *See id.* at 243. The supremacy concept was instead offered as a separate resolution, distinct from legislative powers and listed after the fifth resolution establishing the federal judiciary. *See id.* at 244. That is, a judicial determination that a State's laws were preempted by federal law would not need to await adoption of a congressional resolution to that effect.

Resolution of the competing proposals came when the Convention debated the report of the Committee of the Whole. As he had done throughout the debates, *see id.* at 169 (June 8, 1787), 317 (June 19, 1787), James Madison warned against the "propensity of the States to pursue their particular interests in opposition to the general interest" and advocated "the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." 2 *The Records of the Federal Constitutional Convention of 1787*, at 27 (M. Farrand ed., rev. ed. 1937). Roger Sherman responded, "Such a power involves a wrong principle, to wit, that a law of a State contrary to the articles of the Union, would if not negatived, be valid & operative." *Id.* Randolph's proposal for a legislative power to negative state laws was thereafter defeated by a vote of three to seven. *See*

id.

The Convention then immediately adopted by unanimous consent an alternative proposal by Luther Martin, a proposal in substance similar to Patterson's sixth resolution and in form almost identical to the current Supremacy Clause. *See id.* at 28-29. Consistent with the structure of Patterson's plan, the adopted text that became the Supremacy Clause does not mention any affirmative authority of Congress to repeal state law, but rather made federal law supreme over conflicting state law in all instances. *See* U.S. Const., art. VI, cl. 2; *see also* The Federalist No. 78. In sum, the drafting history of the Supremacy Clause indicates that the Framers rejected the notion that Congress should be presumed not to have intended to preempt state law in the absence of a clear statement to that effect.

Not until 1947 did the Court first suggest that courts should employ an "assumption" that Congress did not intend to preempt the States' exercise of their police powers "unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. Not until the late 1970s was that "assumption" elevated to the status of a "presumption," a term first used in two cases in which the Court invoked the presumption against preemption to reject field preemption claims – claims that preemptive intent should be inferred based solely on the extensive nature of the federal regulation. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-18 (1985).

Over the past 20 years, the Court has invoked the "presumption against preemption" with some

frequency, but it has done so on an inconsistent basis. Particularly in recent years, numerous decisions finding that Congress intended to preempt state law have made no reference to the presumption, even when dissenting justices have complained that the presumption should have led the court to rule against preemption. Decisions lacking any discussion of the presumption against preemption include decisions in both implied conflict preemption cases[6] and express preemption cases.[7]

Given the recent origins of the presumption against preemption, its inconsistent application by the Court, the absence of any constitutional underpinnings for the presumption, and the absence of any evidence

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[6] *See, e.g., Geier*, 529 U.S. 861; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

[7] *See, e.g., Riegel*, 128 S. Ct. 999; *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008). *Rowe* held that a Maine statute was expressly preempted by a provision of the Federal Aviation Administration Act of 1994, 49 U.S.C. § 14501(c)(1), without mentioning a presumption against preemption, despite acknowledging "the importance of [Maine's] public health objective." *Id.* at 996.

The failure to mention the presumption was particularly striking in *Riegel*, which held that the Medical Devices Amendments of 1976 (MDA), 21 U.S.C. § 360c *et seq.*, expressly preempted state-law product liability suits against the manufacturers of medical devices whose design had been approved by FDA pursuant to that agency's PMA approval process. That was in sharp contrast to the Court's opinion 10 years earlier in *Lohr*, in which the presumption against preemption figured prominently in the Court's holding that the MDA did *not* preempt product liability suits involving medical devices that had reached the market under an alternative FDA approval process. *Lohr*, 518 U.S. 470.

that Congress has adopted legislation in reliance on the presumption, *stare decisis* concerns should not cause the Court to refrain from re-examining the continued viability of the presumption.

C. The Presumption Against Preemption Is Based on a Faulty Assumption Regarding How Congress Operates and Has Led to Widespread Confusion Among the Lower Courts

Despite the absence of any constitutional underpinnings for the presumption against preemption, it could still be defended as a rule of statutory construction if there were reason to believe that, in cases in which direct evidence of congressional intent is limited, it provided a reasonably accurate appraisal of what Congress is likely to have intended. But there is no reason for such a belief.

The Court has on occasion explained that the presumption is based on the Court's belief that Congress is reluctant to displace the States' regulatory authority in areas traditionally subject to such authority. Thus, for example, in an ERISA case, the Court held that Congress had not intended to preempt longstanding Massachusetts labor laws – based on a presumption that Congress would be reluctant to take such action given that "the States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, health, comfort, and quiet of all persons.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873)). The Court held that given that likely

reluctance, it was reasonable to presume that Congress had not intended to preempt the laws in question in the absence of an explicit statement to that effect in the ERISA statute or its legislative history. *Id.*

The Court's assumption that Congress is reluctant to preempt state laws touching on the "protection of the lives, health, comfort, and quiet of all persons" has not been borne out by recent history. The history of the modern administrative state has been marked by a steady expansion of federal regulatory authority into areas previously reserved to the States. The long list of recent federal laws that not only have expanded federal regulatory authority but also have included provisions explicitly preempting state regulation include, to name just a few, the Medical Devices Amendments of 1976, 21 U.S.C. § 360c *et seq.*; the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*; the Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq.*; and the Labeling Act, 15 U.S.C. § 1331 *et seq.*[8]

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[8] Other federal statutes expressly preempting areas of state and local law include 2 U.S.C. § 453 (Federal Election Campaign Act); 7 U.S.C. § 136v (Federal Insecticide, Fungicide, and Rodenticide Act); 7 U.S.C. § 228c (Packers and Stockyard Act); 7 U.S.C. § 1626h (Agricultural Marketing Act); 7 U.S.C. § 7756 (Plant Protection Act); 12 U.S.C. § 484a (National Bank Act); 15 U.S.C. § 1261 note (Federal Hazardous Substances Act); 15 U.S.C. § 1278 note (Child Safety Protection Act); 15 U.S.C. § 1461 (Fair Packaging and Labeling Act); 15 U.S.C. § 2075(a) (Consumer Products Safety Act); 15 U.S.C. § 2311(c) (Magnuson-Moss Warranty Act); 15 U.S.C. § 6701 note (Terrorism Risk Insurance Act of 2002); 21 U.S.C. § 467e (Poultry Products Inspection Act); 21 U.S.C. § 678 (Federal Meat Inspection Act); 21 U.S.C. § 1052 (Egg Products Inspection Act); 29 U.S.C. § 667 (Occupational Safety and Health Act); 29 U.S.C. § 1144(a) (Employee Retirement Income Security Act ("ERISA")); 42 U.S.C. §§ 221(n)(2), 2014(hh)

In light of Congress's demonstrated willingness to expand its exclusive regulatory authority into areas traditionally the province of regulation by the States, the presumption against preemption cannot be justified as an accurate predictor of congressional intent. As Justice Scalia has argued, "Under the Supremacy Clause, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part). That meaning is best determined by examining the language and context of the federal statute, not by resorting to presumptions based on guesses regarding congressional willingness to supersede the historic police powers of the States.

Moreover, the Court's use of the presumption against preemption has not provided helpful guidance to the lower courts, nor served to promote uniformity in decision-making. The principal difficulty is that the presumption is inherently vague. The *Cipollone* plurality directed lower courts, "in light of the strong presumption against preemption," to "fairly but . . . narrowly construe the precise language" of federal preemption statutes. *Cipollone*, 505 U.S. at 524 (plurality opinion). But what exactly is a "narrow"

(Price-Anderson Act); 42 U.S.C. §§ 7543(a), 7573 (Clean Air Act); 42 U.S.C. § 14502 (Volunteer Protection Act of 1997); 49 U.S.C. § 5125 (Hazardous Materials Transportation Uniform Safety Act); 49 U.S.C. § 14501(c) (Federal Aviation Administration Authorization Act); 49 U.S.C. §§ 20301-20306 (Safety Appliance Acts); 49 U.S.C. § 3114(a) (Surface Transportation Assistance Act); 49 U.S.C. § 40101 note (General Aviation Revitalization Act); and 49 U.S.C. App. § 1305(a)(1) (Airline Deregulation Act of 1978).

construction of a federal preemption statute if it is not based solely on the statutory language? The Court has not specified, leaving lower courts in wild disarray regarding the strength to be afforded the presumption. Some courts have viewed the presumption as little more than a tie-breaker, to be employed only in those rare instances where the evidence of congressional intent is truly in equipoise. Other courts have afforded the presumption almost dispositive weight, presuming that the challenged state law is not preempted if there is any ambiguity whatsoever regarding congressional intent.[9]

The disarray among the lower courts is well illustrated by the implied conflict preemption issue raised by a case scheduled for argument before the Court this coming fall, *Wyeth v. Levine*, No. 06-1294. The case raises the issue of whether state-law failure-to-warn claims against a drug manufacturer are impliedly preempted by federal law because the Food and Drug

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[9] Indeed, Justice Scalia has questioned the wisdom of ever using "preferential rules and presumptions" in statutory construction cases, explaining:

> It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. . . . [W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.

Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28-29 (1997).

Administration has mandated the precise warnings that must appear on FDA-approved pharmaceutical products. The scores of lower courts that have already addressed that issue are evenly divided between those finding for preemption and those finding against preemption. Interestingly, in virtually every decision finding against preemption, the court relied heavily on the presumption against preemption, while the presumption is barely discussed in decisions finding in favor of preemption. *Compare, e.g., Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) (failure-to-warn claims against pharmaceutical manufacturer are impliedly preempted; little mention is made of the presumption against preemption), with *McNellis v. Pfizer, Inc.*, 2006 U.S. LEXIS 70844 (D.N.J. 2006) (failure-to-warn claims against pharmaceutical manufacturer are not impliedly preempted, based largely on the presumption against preemption).

Perhaps the starkest example of the presumption against preemption being granted dispositive significance is the Second Circuit's recent decision in *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), *aff'd by equally divided court sub nom., Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008). In 2001, this Court ruled that state-law fraud-on-the-FDA claims are impliedly preempted by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* *Buckman*, 531 U.S. 341. *Desiano* raised a virtually indistinguishable fraud-on-the-FDA claim. The Second Circuit nonetheless rejected the defendants' preemption claim, finding that *Buckman* was distinguishable based primarily on the presumption against preemption. While this Court had deemed the presumption inapplicable in *Buckman*, the Second Circuit held that

the presumption *was* applicable in *Desiano*. Thus, even though both cases imposed similar obstacles to the accomplishment of the full purposes and objectives of Congress, the cases reached diametrically opposite results based almost exclusively on the fact that the presumption against preemption was deemed applicable in one case but not the other.

The inability of the lower courts to apply the presumption against preemption in a consistent manner has been a principal reason that the presumption has been subjected to substantial criticism within the legal community. *See, e.g.*, Sharkey, *supra* at 4; Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175 (2000). A variety of tort reform organizations in recent years have filed *amicus* briefs with the Court, calling into question the legitimacy of the presumption. In addition to WLF (which filed such briefs both in this case and *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008)), the Chamber of Commerce of the United States (in *Warner-Lambert, Geier*, and *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007)), and the Products Liability Advisory Council, Inc. (in *Locke*) have both vigorously challenged the presumption. The failure of the presumption to provide any meaningful guidance to the lower courts, combined with its sporadic application in this Court and its inability to improve courts' ability to discern congressional intent, all suggest that the time has come for the Court to abandon the presumption and instead promote reliance on more traditional rules of statutory construction when attempting to discern congressional intent.

II. THE PRESUMPTION AGAINST PREEMPTION IS WHOLLY INAPPLICABLE TO CASES OF THIS SORT

The Court ought to make clear that, whatever the continued viability of the presumption against preemption under other circumstances, it is wholly inapplicable to cases of this sort. Petitioners allege that the Labeling Act's preemption provision, 15 U.S.C. § 1334(b), expressly preempts Good's claims. They further allege that those claims are impliedly preempted by federal law because they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Petitioners deserve to have their preemption arguments decided based on the best available evidence of congressional intent, not based on a presumption that bears no apparent relation to congressional intent.

It is noteworthy that the Court first articulated the presumption against preemption in cases involving field preemption claims. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Field preemption is said to occur:

> [I]f a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. *Rice v. Santa Fe*

Elevator Corp., 331 U.S. 218, 230 (1947).

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

The Court has cautioned, however, that state law should not be deemed preempted simply because the federal regulation is extensive. There are numerous fields in which federal regulation is extensive yet it is well understood that the federal regulatory scheme merely establishes a floor and that States are free to build an additional layer of regulation on top of the federal regulation. Field preemption can be inferred only when the federal regulation becomes "so pervasive" or "so dominant" that there simply is no room for supplemental regulation by the States.

Many businesses subject to extensive federal regulation are, not surprisingly, eager to avoid supplemental regulation by the States; they not infrequently raise field preemption claims in any effort to avoid such supplemental regulation. The earliest decisions articulating a "presumption against preemption" – such as *Jones v. Rath Packing* – all involved field preemption claims. They cautioned that evidence of extensive federal regulation, without more, is insufficient to establish a field preemption claim. Accordingly, the presumption against preemption can perhaps best be understood as requiring plaintiffs to produce some affirmative evidence that Congress consciously sought to preempt state regulation – evidence above and beyond the weak inference of intent that can be drawn from evidence of extensive regulation. In such cases, the presumption can serve as a useful reminder that there is little reason to draw an

inference of an intent to preempt state regulation based solely on the extensive nature of federal regulation in a particular field.

That rationale has no application in conflict preemption cases; there is indeed good reason to assume that Congress would seek to preempt state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. As the Court explained in *Geier*, except for the very rare case in which there is evidence that Congress intended to permit state regulation that tends to undermine Congress's purposes and objectives, the Court will assume that Congress does not so intend:

> Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates. . . . Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary preemption principles, seeks to protect.

Geier, 529 U.S. at 871-72.

Geier thus indicates that "ordinary preemption principles," not the presumption against preemption, should apply to Petitioners' implied conflict preemption

claims. If Petitioners can demonstrate that Good's state-law claim stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress with respect to statements regarding tar and nicotine yields in cigarette advertising, then Petitioners are entitled to dismissal based on implied conflict preemption and without resort to any presumptions.

For similar reasons, the rationale outlined above for applying a presumption in field preemption cases is also of little or no relevance to Petitioners' express preemption claims. When Congress has included an express preemption provision in a statute, the actual language of the statute is a much better guide to Congress's intended meaning than any presumptions about that intent.

The presumption against preemption is inapplicable here for the additional reason that cigarette advertising and labeling – as well as efforts to develop low-tar and nicotine cigarettes that pose a reduced health risk to smokers – have long been subject to extensive federal regulation. As Petitioners' brief makes clear, that history of federal regulation long preceded the adoption of the Labeling Act's current preemption provision in 1969. Pet. Br. 2-12. Given that history, there is no reason to assume that Congress, when it adopted the express preemption provision in 1969, would have been reluctant to displace state regulation of a field in which for some time federal regulation had been dominant. The Court recognized in *Buckman* that invocation of a presumption against preemption is inappropriate in a field already subject to extensive regulation by the federal government.

Buckman, 531 U.S. at 347-48. Moreover, the FTC's extensive oversight of this field means that a finding of preemption will not leave the cigarette industry unpoliced.

Furthermore, Congress has made abundantly clear – as set forth in 15 U.S.C. § 1331 – that a principal reason for adopting the Labeling Act was to ensure uniform regulation of the cigarette industry throughout the nation. A finding that Good's claims are not preempted would threaten to undermine that goal of uniformity. Accordingly, application of a presumption against preemption makes little sense when, through its adoption of the Labeling Act, Congress has made clear a strong desire to ensure uniform regulation.

Finally, a presumption against preemption is inappropriate when, as here, the state laws at issue are duties imposed under the common law. There is far less reason to presume a congressional reluctance to displace state common law (which is established on a case-by-case basis by factfinders not required, when deciding whether to impose liability in a particular case, to weigh the costs and benefits of its actions to society as a whole) than to displace state law established by state officials acting through state administrative or legislative lawmaking processes. As the Court explained in *Riegel*:

> One would think that tort law, applied by juries under a negligence or strict liability standard, is less deserving of preservation [than is state regulatory law]. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How

> many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

Riegel, 128 S. Ct. at 1008.

In sum, even if the Court determines that the presumption against preemption should be preserved under some circumstances, it has no applicability here in light of the facts of this case.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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